SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1091

VIRGIL OGLETREE and KATHRYN BISHOP,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals,
Eighth Judicial District of Ohio.

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THE STATE OF OHIO,
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PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals,
Eighth Judicial District of Ohio.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Virgil Ogletree and Kathryn Bishop, pray that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, Eighth Judicial District of Ohio (Cuyahoga County), made and entered by said Court on September 12, 1966 (a copy of which is attached hereto as Appendix A, *infra,* page 39).

The Ohio Supreme Court refused further appellate review on December 14, 1966, thus making the judgment of the Court of Appeals final on that date—that is, *December 14, 1966.* (Copies of the various entries made by the Ohio Supreme Court are attached hereto as Appendixes B and C, *infra,* page 40.)

OPINIONS OF THE COURTS BELOW.

The trial Court, in this cause, did not see fit to favor counsel, or the various appellate Courts to which this cause could be taken, with any formal or written opinions with reference to the various rulings made on the numerous objections and motions raising the constitutional questions that form the background for this petition. The Court of Appeals while reversing the conviction of Petitioner's six (6) co-defendants, at the trial, on authority of *Griffin v. California, infra* affirmed, by a routine judgment entry, the convictions of these Petitioners (see Appendix A). And, in the Supreme Court of Ohio this cause was "dismissed for the reason that no debatable constitutional question exists."

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of affirmance by the Supreme Court of Ohio was entered on December 14, 1966; hence, the petition herein being filed within ninety days of December 14, 1966, the jurisdiction of this Court is invoked under 28 U. S. C., § 1257(3) since "rights, privileges and immunities" under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

(1) Whether R. C. of Ohio, § 2915.13, which makes it a crime to "carry on" a scheme of chance, is unconstitutional for the reason that it is vague and ambiguous?

(2) Whether an accused can be convicted on an indictment which fails to provide certain minimum information necessary to defense trial preparation, where the Trial Court, upon request, fails to direct the prosecution to supply the accused either a meaningful bill of particulars, or any bill of particulars?

(3) Is probable cause for the issuance of a search warrant properly predicated on an affidavit which merely recites that the affiant's belief that certain gambling paraphernalia was on the premises was based on "information received from a reliable informer made observations of premises observed known persons entering premises who are known to use [sic] as persons interests [sic] in clearinghouse operation scheme of chance"?

(4) Can probable cause for the issuance of a warrant be based on an affidavit which does not set forth *any* of the underlying circumstances from which the undisclosed informer drew his conclusions, and which also fails to set forth any of the underlying circumstances from which the officer concluded that the informant, whose identity was not disclosed, was "credible" or his information "reliable"?

(5) Whether a search warrant purporting to authorize a search for and seizure of "clearinghouse slips, adding machine tape and other paraphernalia used in carrying on a clearinghouse operation number game" is a general warrant the "kind which it was the purpose of the Fourth Amendment to forbid"?

(6) Whether a search warrant can be properly issued for certain described property, when neither the affidavit,

nor the warrant, nor the evidence support any conclusion other than the one that the affiant, or his informant, "merely suspected, believed or concluded" that such property could be found if the described premises were searched?

(7) Whether an affidavit provides a sufficient basis for the finding of probable cause to conduct a search, where the affidavit "contains no affirmative allegation that the affiant spoke with personal knowledge" and "does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge' " as to the presence of any of the property described as the object of the search?

(8) Where the weight of the evidence supports the conclusion that police officers in executing a "search warrant" violated the Fourth Amendment by an unannounced, forcible intrusion into private premises, can the ensuing search be validated and the fruits thereof deemed admissible?

(9) Does due process of law require the reversal of these Petitioners' convictions, where during their joint trial with six (6) co-defendants [a] counsel for the State adversely comments on the failure of such co-defendants to testify in their own behalf, and [b] the trial judge not only instructs the jury that such fact can be considered in arriving at a verdict, but [c] refused to instruct the jury not to draw any inferences from such failure to testify?

(10) Should the convictions of these Petitioners be reversed *in the interest of justice*, where the appeals Court reversed the convictions of their six co-defendants because of prejudicial comment on their failure to testify, by the Court and Prosecutor, who had forcibly argued, by implication, that the necessary inferences to be drawn from

this failure to testify should affect all those jointly being tried for "carrying on" a scheme of chance.

(11) Where two accused persons are jointly tried with six co-defendants on a charge of "carrying on" a scheme of chance, and the Court instructs the jury that those on trial could be convicted if the jury found them to be "aiders and abettors," and the Court of Appeals reverses the conviction of the six co-defendants on constitutional grounds, since there is no way of telling from a general verdict the theory upon which the jury arrived at its verdict, can it be held that those whose convictions were not reversed were properly convicted.

(12) Whether an instruction that "carrying on" a scheme of chance within the meaning of R. C. of Ohio § 2915.13 means "doing something" in connection therewith correctly, and adequately, defines a criminal offense within the meaning of the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES.

CONSTITUTION OF THE UNITED STATES.

Amendment XIV, Section 1, Clause 2:

"* * * nor shall any State deprive any person of life, liberty, or property without due process of law * * *."

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

STATUTES.

R. C. of Ohio, § 2915.13: (Penalty for promoting a "numbers game.")

No person shall establish, open, set on foot, carry on, promote, make, draw, or act as "backer" or "vendor" for or on account of a scheme of chance known as "policy," "numbers game," "clearing house," or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years.

R. C. of Ohio, § 2933.22: (Probable cause.)

A warrant of search or seizure shall issue only upon probable cause supported by oath or affirmation particularly describing the place to be searched and the property and things to be seized.

R. C. of Ohio, § 2933.23: (Affidavit for search warrant.)

A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence

before issuing such warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.

R. C. of Ohio § 2933.24: (Contents of search warrants.)

A warrant for search shall be directed to the proper officer, and by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite all the material facts alleged in the affidavit, and particularly describe the things to be searched for, the house or place to be searched, and the person to be searched and seized. Such warrant shall command the officer to search such house or place or person named or described for the property or other things and to bring them, together with the person to be seized, before the judge or magistrate. The command of the warrant shall be that the search be made in the daytime, unless there is urgent necessity for a search in the night in which case a search in the night may be ordered. Such search warrant shall be returned by the officer holding the same not later than three days after issuance. It shall designate the judge or magistrate to whom it shall be returned, if such judge is available.

R. C. of Ohio, § 2933.241: (Inventory of Property Taken.)

The officer taking property under a warrant for search shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or

premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken and shall be verified by the other. The judge or magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

R. C. of Ohio, § 2945.43: (Defendant may testify.)

On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel.

STATE OF THE PROCEEDINGS AT WHICH, AND MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

Prior to trial Petitioners moved to quash the indictment, alleging, among other reasons, that the statute upon which the indictment was based was "so vague, indefinite, uncertain and ambiguous that men of common intelligence must guess as to its meaning and differ as to its application. And that by reason thereof such statute was unconstitutional and a conviction under it would violate due process." This motion was denied by the trial Court. Next, Petitioners sought a Bill of Particulars, on the stated ground that they were "without sufficient knowledge of the facts concerning the alleged act, to enable * * * [them] to prepare * * * [their] defense." For all practical purposes these motions failed to cure the complained of defect in the accusation; hence, Petitioners were tried without having been fully advised as to the precise charges made by the indictment.

Also, prior to trial Petitioners moved to suppress illegally acquired evidence, which effort was renewed during the course of the trial, and during the course of the arguments on the appropriate motions and objections. Next exceptions were taken to constitutionally impermissible comments by the Prosecutor, and the Court, over the failure of the various co-defendants to testify in their own defense. Further a *Bruno*[1] type instruction was submitted by the defense with the request that it be given to the jury, which request was refused.

Further, each of the alleged constitutional infirmities in these convictions were seasonably presented to, and considered by, the Court of Appeals and to the Supreme Court of Ohio.

STATEMENT OF CASE.

The multiplicity of the issues being raised by this petition require a somewhat expanded treatment of the pertinent facts and evidence. To facilitate this, the following categories will be discussed. First, the *Preliminary Motions, i.e.,* the Motion to Quash Indictment (Appendix D, *infra,* p. 41), and the Motions for a Bill of Particulars (Appendix E, *infra,* p. 42). Next, the Motion to Quash Search Warrant and Suppress Evidence (Appendix E, *infra,* p. 45) will be developed under the topic *The Pre-trial Hearing and Trial.* Also, the facts upon which other assigned errors and Questions Presented depend, will to a degree be developed under this topic.

Preliminary Motions.

I.

Prior to trial each of the Petitioners, as defendants, moved the trial Court to quash the indictment on the very

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[1] *Bruno v. United States,* 308 U. S. 287 (1939).

real ground that the statute under which it was drawn, insofar as applicable here, is unconstitutional. Also, that the term "carrying on" as used in the statute does not with constitutional specificity inform the citizens with reasonable precision the acts made criminal by the statute, nor are such words sufficiently descriptive of the course of conduct intended to be prohibited and which is the duty of the citizens to avoid.

It was further contended that the words "carrying on," as used in the statute, are words that have no determinative meaning and are so general and indefinite as to embrace other specific acts made criminal by the same statute; hence, an acquittal of a defendant under the charge of "carrying on" would not constitute a bar against future prosecutions for other possible offenses under this same statute based on the same evidence. Additionally, it was alleged that the statute was "so vague, indefinite and ambiguous that men of common intelligence must guess as to its meaning and differ as to its application."

This Motion was, without an opinion, denied by the Court. As a consequence, one can only assume the basis used by the Court.

II.

Next, in their quest for a more specific accusation, each Petitioner separately filed a Motion for a Bill of Particulars. In each of these, the allegation, among others, was made that:

> "The State well knows, or should know that the Indictment, as returned, lacks particularity and does not make available to the defendant facts sufficient upon which he [or she as the case may be] can adequately prepare his defense and that the facts are set forth in

sufficient detail to protect the defendant against the danger of double jeopardy."

In response to these Motions, the State filed a Bill in response to the request of the Petitioner, Ogletree, only. (See Appendix E', *infra*, p. 44.) And even in his case, the Bill did no more than reiterate the charge as set forth in the Indictment, which action prompted Ogletree to move the Court, in writing, for a "Supplemental Bill of Particulars."

In this latter Motion, it was specifically pointed out (by the Petitioner Ogletree's papers) to the Court:

> "1. The 'Bill' furnished pursuant to our original Motion (which was treated as a request) is totally inadequate to sufficiently apprise the defendant of the charge he will be required to meet.
>
> 2. The patent ambiguity as between paragraph two and paragraph three of the so-called 'Bill of Particulars,' that was heretofore furnished Defendant, is such that he is unable to discern whether the State is contending that the Defendant (Olgetree) was an aider and abettor or a principal; or whether or not the 'carrying on' noted in paragraph two [of the Bill of Particulars, furnished him], is the same as that charged in the indictment and was for more than one day; or whether the acts stated in paragraph three was meant to be all inclusive—that is, was meant to include those acts particularized in paragraph two."

Responding to this supplemental Motion, counsel for the State resorted to the outmoded contention (citing *State v. Petro,* 148 O. S. 473) that "a prosecuting attorney is not required to disclose the State's evidence through a Bill of Particulars, but is [only] required to state specifically the nature of the offense charged." In any event, without any further articulation by the Court the Petitioner Bishop was not afforded any explanation of the

charges and the Petitioner Olgetree's "Bill of Particulars" was not supplemented so as to provide him with even minimal knowledge of the accusation being made in the indictment.

Pre-trial Hearing and Trial.

I.

Also, prior to trial, each appellant by appropriate motion raised the issue as to the constitutional validity of the search warrant under which the premises, where they were arrested, were searched. In substance, it was alleged:

(1) That the affidavit on which said warrant is based fails to allege sufficient facts or allegations of facts and that such defect is fatal according to the statute in such cases made and provided, to wit: Revised Code of Ohio, § 2933.23.

(2) That the search warrant was improperly issued in that the affidavit was based on hearsay and conclusions rather than the affiant's personal knowledge or the existence of reasonable grounds to believe that the crime alleged was in the process of commission and that such defect is fatal according to the constitution in such cases made and provided.

(3) The search warrant issued herein failed to comply with the absolute requirements of Revised Code of Ohio, § 2933.24 and that such failure is fatal according to the law and constitutions in such cases made and provided.

(4) The search warrant as issued was further defective in the following respects: (a) was general in nature and (b) failed to particularly describe the place to be searched and the person, property or things to be seized.

(5) That the said warrant which purports to authorize the search of "John Doe" does not constitu-

tionally authorize the search of any individual; hence, a search pursuant thereto of any individual is unwarranted, illegal, unconstitutional and void.

(6) That the warrant as issued authorizes a general or exploratory search, the type of which is prohibited by law.

II.

In assailing the search warrant (Appendix G, *infra*, page 47) and the affidavit (Appendix H, *infra*, page 49) upon which it was based, it is our contention that the Court was in error in denying the Motions, and objections, that challenged them as being insufficient on their face, as a matter of constitutional law. But, in this case, that is not all, as was borne out by the hearing on the Motion to Suppress and the ultimate trial.

At the outset, it is significant that the State, at the pretrial hearing, did not offer any evidence to bolster the affidavit upon which the warrant was based. Nevertheless, the evidence at the trial conclusively revealed that officer McCool had merely been given the simple assignment of making observations of 722 Thornhill Drive, Cleveland, Ohio (R. 76-77). And that while making the only such observation, which was on March 25, he saw the Petitioner Ogletree enter those premises at about 3:00 p.m. (R. 78-79). Next, and it could not be clearer, armed solely with this information, he obtained a search warrant from a judge of the Cleveland Municipal Court to search the above designed premises. In this regard, it is most interesting to note that both the affidavit and warrant were made out on routine forms, and contained a stereotyped allegation (that is, the affiant's belief is based on confidential information and observations). These canned allegations appear in all of the affidavits and warrants, with

few exceptions, that are issued to the Cleveland Police in cases of this nature. At least this much is true, counsel has never seen either a warrant or affidavit issued in a "numbers case" in which a comparable allegation was not made. Not only this, but in our judgment these conclusory statements, which can never properly furnish a basis for the determination that probable cause exists (*cf., Aguilar v. Texas, infra*) are illustrative of the fact that the issuing magistrates are not performing their neutral and detached function but are relying solely on the officers' conclusion that probable cause exists. *Giordenello v. United States,* 357 U. S. 480 (1958).

During the pre-trial hearing, on the Petitioners' Motion, none of the details attendant to the actual procurement of the warrant were developed by the prosecution. Nevertheless, in the wake of the disclosure of the meager factual basis upon which they sought and obtained this warrant, and quite apart from the contention that the warrant and affidavit were defective on their faces, if not the motion, then surely the objection to the introduction of evidence seized pursuant to such warrant ought to have been deemed well taken (R. 264-265).

III.

In his original testimonial version as to how the execution of the warrant was effected, Patrolman McCool related, in substance, that on the 26th day of March, 1964, he and several other police officers arrived at the home of the appellant Harris, located at 722 Thornhill Drive (R. 12); and that they were armed with the search warrant (R. 13).

This warrant was testified to as having been based on an affidavit (Appendix H) that contained the naked and conclusory allegation:

"Information received from reliable informer made observations of premise, observed persons entering premise who are known to use or persons interested in clearinghouse operation scheme of chance." (R. 14.)

Also, Patrolman McCool added that the warrant was obtained during the morning of the 26th of March (R. 16) from Judge Cassidy of the Cleveland Municipal Court. Next, this officer described, in response to defense questions, the following events:

"Q. And then at 4:10 [of the day of the involved] you went to the side door?

A. Yes, I did.

Q. And you pushed that door in, didn't you?

A. I did not.

Q. Well, it was pushed in?

A. Yes.

* * *

Q. But where inside?

A. Right inside the side door." (R. 17-19.)

IV.

Other aspects of the evidence, in this cause, show that despite the mandatory provision of R. C. of Ohio, § 2933.241, no inventory of the property seized was given by the officers (R. 70). And from the evidence presented *at the trial* it is also clear that the officers did not see any of the Petitioners doing anything. In fact, according to the State's evidence, persons arrested were in various places about the room when the police ultimately gained entrance. Additionally, there was testimony to the effect that with the exception of the Petitioner Ogletree, none of the persons on trial did anything; hence, the only proof offered against such persons was the fact of their mere presence (R. 302-312). Necessarily then, there was generated an

issue as to whether or not such fact alone could satisfy the requirement of proof beyond a reasonable doubt. To say nothing of being sufficient to refute positive testimony explanatory of such presence which testimony was not confuted but actually was buttressed by the presumption of their innocence.

Thus, it was with these factors in mind the Court was requested, in view of its omission from the general charge given the jury, to instruct the jury that "mere presence at the scene of a crime is insufficient to establish guilt." This request was refused by the Court (R. 374).

V.

Basically, the evidence produced by the State was to the effect that during the period it required for them to force an entry into these premises, evidence pertaining to the operation of a clearinghouse game was either being, or was in the process of being, destroyed by fire. Their evidence, as depicted by the numerous exhibits, at best, only shows that the remnants of burnt paper found on the premises could have been used in some manner in the numbers game.

For the defense, the Petitioner (Ogletree) offered a plausible explanation accounting for his presence and that of his co-defendants, at the trial, Haskins and Harris. He explained that he was in the process of burning what he thought was trash.

VI.

Of further significance in this discussion is the grievous wrong committed by the State in its argument (R. 346-349), and by the Court in its denial of the Motion for a Mistrial (R. 346); as well as the Court's affirmative

instruction that the jury could take into consideration the fact that several of the appellants did not testify, and that their failure to testify was a proper subject for comment by the State (R. 362-363).

In addition to this, the record shows that the Court refused to give, prior to argument, the following requested instruction:

SPECIAL REQUEST TO CHARGE NO. 1:

"The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner." [2]

In addition to this, counsel, in taking further specific exceptions to the Court's charge, made the following remarks:

"Mr. Willis: Prior to the instructions given by the Court, I submitted to the Court this Special Request No. 1:

"The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner!"

"Then at the conclusion of the Court's general charge to the jury, I requested the Court to instruct the jury that the mere presence at the scene of a crime

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[2] See R. 331, where the following remark appears in the record, "which request was denied by the Court, to which ruling of the Court the Petitioners, by their counsel, then and there duly excepted." (Also see R. 374.)

is insufficient to establish guilt. Mr. Brown objected, and the Court did not give that instruction.

* * *

"I further except to the Court's instruction to the jury that carrying on means doing something, and on the theory that my objection is based on the idea that such definition is clearly insufficient and is ambiguous and is not specific enough to enlighten the jury, as to the actual charge set forth in the indictment." (R. 374-376.)

Based on the above facts, and others—that will be developed in the argument—the judgment herein being assailed was created. That it cannot be allowed to survive is, in our judgment, but a logical conclusion.

ARGUMENTS RELIED ON FOR ALLOWANCE OF THE WRIT.

A. An Indictment Predicated on a Vague and Ambiguous Statute Is Void and Without Legal Effect.

As is usually the case with most of Ohio's criminal statutes, one will find very few, if any, decisions that are of significance. The reason for this, of course, is the fact that most criminal appeals are resolved on the basis of the State's harmless error statute, which statute authorizes an *ad hoc* analysis, and thus does very little toward filling numerous precedent voids that exist. The issues raised by this quest for appellate review clearly demonstrate this fact, as there are no decisions available from our Courts delineating an authoritative construction of R. C. of Ohio, § 2915.13.

Of further significance is the fact that nowhere in this statute is the term "carrying on" defined. This term is, of course, vital to a proper resolution of the threshold issue. In our judgment, it does not suffice to merely suppose that

the statute complies with the requirements in the Constitution. We ought to be able to point to some authority, other than the statute itself. If nothing else, this would permit an informed judgment as to whether the trial Court was correct in charging:

> "The statute uses the phrase, 'carrying on.' By carrying on is meant to operate or to do something in connection with that concerning which you are concerned with [sic]. For instance, you may enter into a transaction with someone for the purchase of an automobile, and you may say you are carrying on a transaction. You are proceeding, you are doing something in connection with the purchase of an automobile. So what the Legislature intended here is that the persons were doing something in the operation of somewhere along the line of the scheme of chance." (R. 359-360.)

On the other hand, it is generally the law that a penal statute must be sufficiently definite to apprise a person of ordinary intelligence of the conduct that is prohibited. And where, as here, the statute is not sufficiently descriptive of the acts, conduct or conditions required or forbidden, such statute does not satisfy due process requirements of the Fourteenth Amendment. See Vol. I, Wharton, *Criminal Law and Procedure,* § 18; Vol. 14 *Am. Jur.,* Constitutional Law, § 585, 50 *Am. Jur.,* Statutes, §§ 472 et seq.

In assaying the possible merit of this aspect of our contention (that is, that the statute, here involved, is not sufficiently descriptive of the course conduct prohibited), consider the holding in *Lanzetta v. New Jersey,* 306 U. S. 451, 83 L. ed. 88. In *Lanzetta,* the holding (as summarized in Headnote 3, of 88 L. ed.) was:

> "To be consistent with the constitutional requirement of due process, the terms of a penal statute creating

> a new offense should not forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, but must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."

Moreover, in a further comment on *Lanzetta,* it was stated, by the annotators, and in a fashion consistent with our premise, that:

> "* * * suffice it to say that a criminal statute which defines the offense in such uncertain terms that persons of ordinary intelligence cannot in advance tell whether a certain action or course of conduct would be within its prohibition is subject to the attack of unconstitutionality * * *." (88 L. Ed., at 893.)

If such is the law (and the Brief filed by the State will not indicate any contrary view), then the essential question is whether under this statute—*i.e.,* R. C. of Ohio, § 2915.13—there are ascertainable standards of guilt. Stated another way, do the words "carry on" a scheme of chance convey a sufficient warning as to the conduct proscribed when measured by common understanding. As stated by Mr. Justice Douglass, in *United States v. Cardiff,* 286 U. S. 210:

> "* * * the vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited."

In our judgment, the statute before us is dragnet in its scope. Not only, it purports to prohibit the promoting of a scheme of chance, which is conduct usually ascribed to the "vendors" or "backers." At the same time this statute further attempts to qualify any and all persons, who might have even a vague connection with such vendors or

backers (even as employers) for the same penal sanctions. Although one can suppose the State could under its police power so magnify such lesser acts, the fact that they do so by resort to the vague omnium-gatherum phrase: "carrying on," which lacks specificity, renders that aspect of the statute unconstitutional.

If this is so then it must be that where, as here, the statute under which the indictment is drawn is so vague and uncertain that one is compelled to speculate as to just what conduct is specifically prohibited, such defect is fatal to the validity of the statute.

Where the charge against an accused is general and indefinite such accused is entitled to a bill of particulars.

No one can deny that the intended office of a Bill of Particulars is to furnish an accused further information respecting the charge stated in an indictment. This is especially so when such information is necessary to the preparation of a defense, or to avoid prejudicial surprise at the time of the trial. Moreover, when necessary for such purposes, a Bill of Particulars should be granted even though it may require the furnishing of information which in other circumstances would not be required because evidentiary in nature.

It is submitted that the test that ought to be applied, of course, is whenever the indictment is comprehensive enough to embrace the offense charged (and others), but not specific enough to give information to which the accused is entitled, a Bill of Particulars is required. Hence, an accused is entitled to ample notice of the specific charge against him, and he is entitled to be informed of the particular transactions claimed by the prosecution to be criminal so that he may be prepared to make whatever defense he has.

In this same regard, it cannot be doubted that where, as in this case, as the indictment merely charges that one "carried on" an illegal enterprise, more should be stated in a Bill of Particulars than a mere repetition of the indictment to satisfy the office ascribed to these bills.

Of course, the above reference is to the fact that such was done in the instance of the Petitioner Ogletree. As to the other indictees, their request for a Bill of Particulars was not heeded. The effect of this is that they were required to proceed to trial without the benefit of even the advantage afforded by a Bill. This latent failure by the State, which ought not be countenanced, makes for an error of reversible proportions—at least as to them. And, as to Ogletree, the failure of the State to have further supplied, upon request, an appropriate supplement to the insufficient Bill that was given him, requires the same result.

B. Due Process of Law Requires that the Affidavit for a Search Warrant Provide a Sufficient Basis for the Magistrate's Determination that Probable Cause Existed.

According to the Fourth Amendment "* * * no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Cf.*, Revised Code of Ohio, § 2933.22, which embodies the mandate of the Amendment.

Although our statute is essentially a reaffirmation of the Amendment, even without such statute, the Fourth Amendment of the United States Constitution applies to Ohio. This, of course, is consistent with the basic logic used by the Supreme Court in *Mapp v. Ohio*, 367 U. S. 643 (1961), *i.e.*, that the exclusionary rule is a part of the Fourth Amendment; the Fourth Amendment is part of

the due process clause of the Fourteenth; therefore, the exclusionary rule is a part of the Fourteenth Amendment.

It would seem then that for the proper issuance of any warrant "probable cause," in the first instance, must be shown to exist. Next, it must be supported by "oath or affirmation," particularly describing the place to be searched and the person, things, and property to be seized. In line with this Ohio's code significantly provides, in § 2933.23, that the affidavit for the warrant, in addition to describing the house or place to be searched, the things to be searched for and seized, must also state the facts upon which this belief is based.

This then brings us to one of the basic tenets of this Petition which is that the warrant was issued without the existence of "probable cause" because the affidavit upon which it was based was constitutionally insufficient.

Of course, it could not be clearer, but the affidavit of police officer McCool merely alleged that his belief was predicated upon "information" given assertedly by a "reliable informer" and upon personal observation, wherein people known to him to be engaged in the clearinghouse business were seen visiting the premises. It thus follows that the efficacy of this warrant must stand or fall on a determination as to whether or not the affidavit presented a sufficient basis upon which a finding of probable cause could be made. *Giordenello v. United States,* 357 U. S. 480 (1958). This is so because the determination—*i.e.,* of the existence of probable cause—is required to be made in accordance with the "fundamental criteria laid down by the Fourth Amendment and in the opinions * * * [of the] Supreme Court applying that Amendment." *Ker v. California,* 374 U. S. 23, 33 (1963). Also, it is the law that "findings of reasonableness, * * *, are respected only insofar as consistent with constitutional guarantees." *Ibid.*

Hence, there should have been no doubt as to the propriety of the Motion to Suppress if in fact no probable cause existed for the warrant's issuance.[3]

In this regard, not only is an issue being made as to the sufficiency of the allegations but also we do contend that, notwithstanding any possible construction of the affidavit to the contrary, the officer did not have "good cause to believe" that any specific property, vulnerable to a search warrant, could be located at the places searched.[4]

Again, in *Jones v. United States*, 362 U. S., at 272, it was held that a warrant could issue on the basis of hearsay "* * * [provided] a substantial basis for crediting the hearsay is presented." Significantly, in *Jones*, the warrant was obtained on the basis of an affidavit of a narcotics enforcement officer which alleged in considerable detail that: an informant had told the officer that *Jones* had a supply of narcotics in his apartment, it described a precise place in the apartment where the drugs would be found. Also, the affidavit set forth that the informant had obtained narcotics at this apartment on numerous occasions, the last time being that particular day. Further, the affiant officer swore that he personally knew the defendant to be a user of narcotics. Also, significant was the fact that the informer's specific statements were corroborated by

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[3] *Jones v. United States*, 362 U. S. 257 (1960). *Cf., Rugendorf v. United States*, 376 U. S. 528 (1964). In *Rugendorf*, this Court concluded that factual inaccuracies which "go to the integrity of the affidavit" (*id.*, at 523) or "show that the affiant was in bad faith or that he * * * made misrepresentations to the Commissioner [here the application was made to the Court] in securing the warrant" (*id.*, at 533) could be used as a basis for defeating the requisite probable cause. The same theory is deducible from the holding in *Jones* (cited above), where the Court finally concluded that: "there was a substantial basis" for the conclusion that probable cause existed and that was sufficient." 362 U. S., at 271.

[4] *Jones v. United States*, 357 U. S. 257 (1960).

other informers. Hence, these factors were held to constitute a substantial basis for the Commissioner's determination that narcotics were probably present in the apartment. *Ibid.*

More specifically, in *Aguilar v. Texas,* 378 U. S. 108 (1964), this Court further expanded on the requirements for a proper warrant. Relying on *Giordenello v. United States,* 357 U. S. 480, it was ruled that the issuing magistrate "must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion[s] * * *." Thus, it is not without significance that in condemning the warrant in *Giordenello,* this Court stated that:

> "The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made. * * * In these circumstances, it is difficult to understand how the commissioner could be expected to assess independently the probability that the Petitioner committed the crime charged." *Id.,* at 486-487.

Hence, in *Aguilar,* the warrant was deemed defective despite the fact that it contained allegations to the effect that the officer had "reliable information from a credible person" that Aguilar had narcotics for sale at a particular address. In addition to this, the evidence showed that the officers had actually kept the premises under surveillance for a week. Yet, and in face of these facts, it was concluded "the warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause. And that the evidence obtained as a re-

sult of the search warrant was inadmissible in Petitioner's trial." *Id.*, at 115-116.

Apropos here, in *Aguilar*, this Court criticized (*id.*, at 114-115) the affidavit not only because it did not contain an allegation that the affiant spoke with personal knowledge of the matters contained therein, but this Court specifically noted that it lacked an affirmative allegation even that the affiant's unidentified source spoke with personal knowledge. Moreover, according to that opinion, the affidavit was further defective because "for all that appears, the source here merely suspected, believed or concluded that the narcotics were in the Petitioner's possession. The magistrate * * * could not 'judge for himself the persuasiveness of the facts relied on * * * to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.' "

The same glaring defects are present in the warrant issued herein. The only allegation about personal knowledge of facts is inconsequential; hence, meaningless to a proper determination of this issue. More specifically, Patrolman McCool stated that his belief that the described property was in the possession of "persons unknown," was based on "information received from a reliable informer." Further he alleged that he made "observation observed known persons entering premises who are known to use [sic] as persons interested in clearinghouse operation scheme of chance." [5] What is even more important, how-

[5] In view of *McDonald v. United States*, 335 U. S. 451 (1948) no significance can be given to this allegation of observations. In *McDonald* (also a numbers case), the officers there involved had been watching his activities for several months, and had seen him enter "during the hours in which operations at the headquarters of the numbers game are customarily carried on." And on the day of the arrest the officer claimed he heard an adding machine. The Court held that these observations were

ever, is the fact that there was no "affirmative allegation" that this alleged informant spoke of personal knowledge, nor was the informant's reliability sufficiently vouched for in the affidavit.

In this Court's analysis of the warrant, and the affidavit upon which it is based, it is hoped, and in all deference to the Court that issued it, that the final determination will be consistent with the argument advanced above.

C. "When the Constitutional Validity * * * [the Issuance of a Warrant] Was Challenged, It Was Incumbent Upon the Prosecution to Show With Considerably More Specificity Than Was Done in This Case What the Informer Actually Said, and Why the Officer Thought the Information Was Credible." [6]

In this cause, nowhere in Officer McCool's affidavit, or in his testimony was there any indication that he even knew who, if anyone, gave the information, or what the information was, that prompted Sergeant Dever to assign him to make observations of the address where the search was subsequently made. We do know this, however, his testimony in the record reveals only these facts; that is, upon orders from his Sergeant (R. 77), the officer-affiant made a single observation of 722 Thornhill Drive (R. 78), which was the home of one of the co-defendants (R. 77). Next, that after assuming a vantage point, following his arrival "at approximately a quarter to 3:00" (R. 78), "[he] observed Virgil Ogletree [one of the Petitioners] and an unidentified female park the car and go into the house"

(Continued from preceding page)

insufficient to warrant an inference that a numbers operation was in progress.

[6] *Beck v. Ohio*, 379 U. S. 89, 97 (1964).

(R. 79). And, finally, that on the following morning, the date involved here, the affiant obtained the search warrant used in this search "[b]ased on the affidavit in the file" (R. 82).

Hopefully, it should not require much argument to persuade this Court that the method used by the police to obtain this warrant adds significance to cogent observation that:

> "unless the magistrate makes his independent judgment on all the known facts, then he tends to become merely the tool of police interest." [7]

Be all that as it may, based on the requirements of the Constitution, as above argued, quite obviously the affiant-officer did not have sufficient information, even had there been a complete disclosure, to constitutionally qualify for a warrant.

An alternative argument, available to these Petitioners, is that the warrant as issued purported to authorize a general search such as was declared to be beyond the pale of the State's authority to authorize. In this regard, consider *Stanford v. Texas,* 379 U. S. 476 (1965), where this Court measured a search warrant that had been issued to search a home for "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the communist party of Texas." Pursuant to the warrant in *Stanford,* it will be recalled an extensive search of the premises was conducted and considerable property belonging to the Petitioner was seized. Thus this Court ruled that such search violated the protections of the Fourth and Fourteenth

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[7] *Jones v. United States,* 362 U. S. 257, 273 (1960) (concurring opinion). Also see *Jaben v. United States,* 381 U. S. 214 (1965). *Cf., United States v. Ventresca,* 380 U. S. 102, 108 (1965).

Amendments guaranteed against invasion by the States, because the warrant as issued ostensibly authorized a general search. Thus, the conclusion is clear a State may not constitutionally issue general warrants such as was issued here, which do not with particularity describe the things to be seized.

Another analogy between the *Stanford* case, and our contentions as against the warrant in our case, lies in the fact that both warrants lack the required particularity, and neither was based on any specific information that any of the property sought by the warrants had ever been seen on the premises by anyone. In line with this it is submitted that the above contention cannot be confuted, for it is clear that the property denominated in the warrant under attack, was merely a general designation of the property one would expect to find if they came upon a numbers' office. This is as true here as it was in *Stanford v. Texas,* where the warrant similarly described property one would expect to find in the place searched was an office of the communist party of Texas. Moreover, and perhaps most compelling, is the fact that both warrants (the one in *Stanford v. Texas* and the one here) lack the designation of any one specific item of property as the object of the search, for which there was probable cause to believe was in the premises.

D. The Statutes Requiring Notice of Authority and Purpose Before Forcing Entry into a Private Home Are Strictly Construed.

Even if we assume that the warrant herein was in all respects properly issued, still the fact that it was not executed in compliance with the statute, in such cases made and provided, is alone sufficient to invalidate it and render a search ostensibly made pursuant thereto unreason-

able. In this regard, our code provides that an officer may break down an outer door; or inner door, or window of a dwelling house or building if, after notice of his intention to make a search pursuant to a warrant, he is refused admittance. R. C. of Ohio, § 2935.12. This formality, which requires the police to say who they are and state why they demand admittance, is of ancient vintage, going all the way back to the 15th Century in the English Common Law. Thus, an otherwise valid search can deteriorate into the zone of "unreasonableness" merely by failure to comply with the statute relative to execution thereof.

Of considerable importance in this phase of our contention is the case of *Miller v. United States,* 357 U. S. 301 (1958). In *Miller,* the Supreme Court reversed the conviction of a notorious, and undoubtedly guilty narcotic peddler simply because the police, who broke into his apartment and found a large quantity of heroin, neglected to first announce their purpose and authority in demanding entrance. The above case is further significant because there was an abundance of "probable cause" to enter the premises, although without a warrant, to effect an arrest. The Court held that this failure to comply with the statutory notice requirement rendered the search unlawful. It is submitted that the statute involved in the *Miller* case and Ohio's notice statute are sufficiently comparable to require comparable rulings for comparable violations by the police.

It is indeed unfortunate that Courts almost routinely give a policeman's testimony, on any issue, more credence than the testimony of other witnesses. As counsel has argued before, one can expect police officers, because of their zealous interest in the outcome of their cases—if for no other reason than to vindicate their own blunders—to be less than candid in their evidence. Also one can

expect that they will, and usually do, prepare for their testimony so as not to contradict one another. Hence, when one officer gives a version favorable to the defense, his attempts to retreat from that position ought to be fraught with suspicion.

In this case, the testimony by Officer McCool on direct-examination as to when they announced their purpose for entry was unequivocal. He stated that when they arrived at the premises they proceeded to force their way in. (R. 17.) Also, he added that after having gained entrance, in this unauthorized manner, and they were "right inside the side door" when they heard *voices* saying "it's the police." (R. 18.)

Later, however, upon being led through these same events, by counsel for the State, he was ushered into saying that: the Sergeant announced that he had a warrant, and that he heard the remark "it's the police" before the entry was forced. (R. 31.) This new thought was reiterated upon a later examination by the defense. This time it came out that they heard the remark, "it's the police" when "we were at the door." (R. 42.) Significantly, during this same portion of his "candid" testimony, this officer described the voices, referred to above, as "a husky voice." (R. 41.) If these contradictions alone do not belie his evidence, then surely the testimony of Virgil Ogletree, Henry Harris and Jessee Haskins, who described this entry, does.

Of additional importance, is the fact that it was borne out, not only by their evidence, but the later testimony of Kathryn Bishop (R. 302-306), that all of the men were on the upper floors, and that only the women were downstairs. This testimony further buttressed the contention that the statute regulating entry was honored in this case by its breach.

In summary, with reference to the affidavit and warrant in this case, the following argument ought to be deemed controlling. In *Aguilar*, the Supreme Court, in striking down a warrant similar to the one in this case, set forth two elements that must be satisfied before the warrant should be issued; more specifically, in so doing the Court stated:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U. S. 257, *the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were*, [and] some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 U. S. 528, was 'credible' or his information reliable." (Emphasis supplied.)

It is thus crystal clear that these elements are not met by the affidavit in this case. Moreover, as in *Aguilar*, the affidavit here involved was predicated on hearsay; hence, the guiding principle for determining its validity is the one set forth in *Jones v. United States*, 362 U. S. 257. Thus, the ultimate question is whether there was a "substantial basis for crediting the hearsay."

Taking into account the absence of any meaning observations by the officer (he only made one) and the absence of information upon which the magistrate could have reasonably concluded that the officers alleged informant was reliable, it ought to follow that the affidavit cannot pass muster because it was clearly insufficient.

Stated another way, the magistrate in this case not having been informed of any of the underlying circumstances from which the informant concluded that a *scheme*

of chance was being carried on at the described premises, and not having been informed of any of the underlying circumstances from which the affiant-officer concluded that the informant was "credible" or his information "reliable," the necessary inferences, from whatever facts were available, even assuming such facts were sufficiently stated, were drawn not "by a neutral and detached magistrate" as the Constitution requires; but by a police officer "engaged in the competitive enterprise of ferreting out crime" *Giordenello v. United States,* 357 U. S., at 486 or by an "unidentified informant." *Aguilar v. Texas, supra.* In short, the affidavit in this case fails to provide the affiant's answer to the magistrate's hypothetical question, "what makes you think the defendant committed the offense charged" *Jaben v. United States,* 381 U. S. 214, at 224 [1965].

E. Due Process of Law Requires Specific Proof of Specific Crime.

As was said by this Court, in *Thompson v. Louisville,* 362 U. S. 199 (1964), "just as 'conviction upon a charge not made would be a denial of due process' so is it a violation of due process to convict and punish a man without evidence of his guilt." *Id.,* at 206. This tenet, it is submitted, fully applies to this prosecution. For, as was argued above, and it could not be clearer all the State's evidence showed in this case was the fact that these people were present in the home when the house was searched.

Surely, mere presence at the scene of a crime is insufficient to establish guilt. And, although there are no cases, or authorities, in this State which create, or purport to create a presumption to the contrary, the trial Court refused upon request to specifically instruct the jury that more was required to convict a particular de-

fendant than a mere showing that such defendant was present. The effect of this failure was that the jury then was free to assume, and probably did assume, that the mere presence of any defendant was sufficient to supply requisite elements of the offense charged.

In summary, the record is cogently clear, there was no specific evidence even remotely designed or calculated to show that any of these people, other than Ogletree, did anything or even came in contact with the property introduced as evidence that a scheme of chance was being "carried on" an enterprise creates the presumption that the one attempting the destruction is the culprit, the crucial question is whether such presumption can be made to include all those present regardless of the fact that there was no evidence that they affirmatively did anything.

F. The Fifth Amendment Bars Comment, Either by the Court or Counsel for the State, on Accused Persons' Election Not to Testify.

Upon the termination of the presentation of evidence, and before final argument because most of the defendants did not testify (that is, Jessee Haskins, Mamie Bishop, Juanita Umphrys, Henry Harris, Janice Franklin, and Nannie Teague all of whose cases were reversed by the Court of Appeals) the defendant requested the Court to instruct the jury relative to this failure to testify and the right of self-incrimination.

Further, when the fact of such failure to testify was commented on by the State during argument (R. 346), appropriate motions for a mistrial were made. Similar exceptions were taken to the Court's instructions which were framed in accordance to R. C. of Ohio, § 2945.43, which statute ostensibly purports to implement Article I, § 10 of the Ohio Constitution in authorizing comment.

Suffice it to say, even without the opinion of *Douglas v. California,* 380 U. S. 609 (1965), the efficacy of both the above statute and constitutional provisions had for all intents and purposes been rendered void by the inclusion of the Fifth Amendment into the scope of fundamental "due process" in *Malloy v. Hogan,* 378 U. S. 1 (1963). And in *U. S. ex rel. Shott v. Tehan, Sheriff,* 337 F. 2d 990 (1964), both were declared unconstitutional, which ruling was fully binding on the trial Court at the time the comments were made by the Prosecutor and the Court. *Bush v. Orleans Parish School,* 188 F. Supp. 916, 927 (1960), affirmed 365 U. S. 569 (1961).

With the above constitutional principles in mind, it is contended herein that since these Petitioners were tried with six (6) co-defendants for the crime of *carrying on* a scheme of chance, the Court of Appeals having determined that the convictions of the six (6) co-defendants should be reversed because of the improper comments of the Prosecutor, and the Court, on their failure to testify, in the interest of justice the convictions of these Petitioners should also be reversed.

The record in this case clearly shows within the purview of our Supreme Court's decision in *State v. Lynn,* 5 Ohio St. 2d 106, that the question of the prejudicial effect of the assailed comments by the Prosecutor and the Court were presented to both the trial judge and to the Court of Appeals. Yet, although it is clear why the trial Court failed to credit this complaint (he denied the argument even insofar as these who did testify and were directly affected), the reason why this argument was rejected by the Court of Appeals and the Ohio Supreme Court is not so clear. For if nothing else, those Courts must have recognized that such comments are improper; hence, those Courts must feel that this Court's opinion in *Griffin* does not require a reversal.

Surely, it cannot be denied that if, as the Ohio Court of Appeals found, these comments constituted a material defect in the trial which prejudiced the rights of six (6) of the original eight (8) defendants, such defect necessarily must have had an adverse effect on these Petitioners before the jury. At least this much is certain, no one can say that these comments had no effect; so much so, that the reverse is more likely true—that is, there is more than a reasonable possibility that the comments complained of contributed to the conviction.[8]

Again, we contend that with the fact that these adverse comments were made as against those who did not testify, they necessarily had an adverse effect on the interest of those that did testify. And that when the Court of Appeals properly deemed the argument and comments improper as to some of the defendants it was more than slightly startling that that Court would not reverse as all defendants. In this same regard, it is further significant that the Ohio Court's refusal to pass on the propriety of the instruction which counsel submitted, on behalf of all those on trial. Hence, we contend, in this petition, that the testifying defendants have a right to insist that the Court give them whatever benefit they could gain from an insistence by the non-testifying defendants that a *Bruno*[9] type instruction be given.

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[8] *Fahy v. Connecticut,* 375 U. S. 85, at 86-87 (1963).

[9] *Bruno v. United States,* 308 U. S. 287 (1939).

G. An Instruction as to the Applicable Law That Is Ambiguous and Confusing Does Not Comply With Due Process.

The office of an instruction, to the jury, is to explain the facts and to declare what rules of law will apply to any set of facts which may be found in the evidence. The charge to be appropriate, should not leave to the jury's judgment what constitutes the offense charged, but should fully advise the jury as to the applicable rules of law. Needless to say, the charges should be clearly stated. Not only this, but they should be both definite and certain so as to fairly inform the jury of the rules and principles of law applicable to the case, by which they are to be guided in forming their verdict.

In this case, in addition to instructing the jury as to the purport of an unconstitutional statute (R. C. of Ohio, § 2945.43), the Court further instructed the jury, in language that does not lend itself to clarity, that "carry on" meant doing something.[10] This instruction at best cannot be said to fill with the office of an instruction. This is so for the obvious reason that no one can really say what it means.

If such is the case, and we submit that it is, and if an accused is entitled to have the jury so instructed that it may not become confused as the elements of the offense charged; then, where, as here, such confusion perforce was present, the creation of such confusion can only be classified as a denial of due process.

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[10] In substance the court instructed the jury that "carrying on" meant to do something in connection therewith (R. 359-360).

CONCLUSION.

The convictions, in this case, were obtained by virtue of the successful frustration, and at the expense, of even the minimum standards of due process. Here the Petitioners have shown that they were not adequately advised of any of the particulars of the indictment, which was predicated on an ambiguous statute. They have shown that despite the requirements of the Constitutions (that a "substantial basis" for the magistrate's determination that probable cause must exist; that there should be a "substantial basis for crediting the hearsay"; and to that end, the magistrate should be informed of "*some* of the underlying circumstances" affecting the informer's credibility and the reliability of his information) the State Courts have failed, for unexpressed reasons, to measure these convictions in accordance with such standards. And they have shown that their convictions were influenced by the constitutionally impermissible comments, by the Court and counsel, on the failure of their co-defendants to testify; as well as a complete lack of evidence to support their conviction.

With these unassailable contentions in mind, the Petitioners most earnestly urge that this Court grant certiorari to review their cause.

Respectfully submitted,

JAMES R. WILLIS, ESQ.,
Attorney for Petitioners.

APPENDIX A.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Entered September 12, 1966.)

This cause came on to be heard upon the appeal on questions of law from the judgment of the trial court and was argued by counsel for the parties; and upon consideration thereof the Court finds, as to the defendants Virgil Ogletree and Kathryn Bishop, no error prejudicial to these appellants and therefore the judgment of the trial court is affirmed as to said defendants.

As to the defendants Jessie Haskins, Janice Franklin, Henry Harris, Mamie Bishop, Nannie Teague and Juanita Umphryes, the Court finds that the comment by the trial court and by the prosecutor upon the failure of said defendants to testify in this criminal proceeding against them violated the self-incrimination clause of the Fifth Amendment made applicable to the states by the Fourteenth Amendment of the Constitution of the United States (See *Griffin v. California,* 14 L. Ed. 2nd 106), and the doctrine of the *Griffin* case is applicable to cases such as the instant case, pending on appeal at the time of its pronouncement (See *Linkletter v. Walker, Warden,* 14 L. ed. 2d 601); and therefore as to said defendants Jessie Haskins, Janice Franklin, Henry Harris, Mamie Bishop, Nannie Teague and Juanita Umphryes the judgment of the trial court and this cause is remanded for further proceedings according to law.

It is ordered that appellee recover of defendants Virgil Ogletree and Kathryn Bishop one fourth of the costs of this proceeding herein taxed.

It is further ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

APPENDIX B.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO, DISMISSING APPEAL, DECEMBER 14, 1966.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX C.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR LEAVE TO APPEAL, DECEMBER 14, 1966.

It is ordered by the Court that this motion is overruled.

APPENDIX D.

MOTION TO QUASH INDICTMENT.

The defendants, Virgil Ogletree, Jesse Haskins, Janice Franklin, Henry Harris, Nannie Teague, Mamie Bishop, Kathryn Bishop, and Juanita Umphrys, move the Court that the indictment returned herein be quashed, and in support thereof aver as follows:

I.

The statute, i.e., R. C. of Ohio § 2915.13, in so far as applicable here, is unconstitutional. More specifically the statute purports to prohibit the "carrying on" of a number of gambling enterprises. Further that such phrase does not with constitutional specificity inform the citizens of this State with reasonable precision of the acts made criminal by this particular phrase. Nor are such words sufficiently descriptive of a course the conduct intended to be prohibited and which is the duty of the citizens to avoid.

II.

The statute is further assailed as being unconstitutional because its meaning (so far as applicable here) cannot be judicially ascertained. This is particularly so because the words "carrying on," as used in the statute, are words that have no determinative meaning and are so general and indefinite as to embrace other specific acts made criminal by the same statute [e.g., (a) establish, (b) open, (c) set on fact, (d) promote, (e) make, (f) act as a backer, or (g) vendor, and (h) etc.]. Additionally, and because of this fact, a judgment of conviction or acquittal of any one, or all of the defendants, hereunder would not protect them from future prosecutions for the other possible offenses under this same statute based on the same alleged facts and circumstances.

III.

That the statute, in general, is so vague, indefinite, uncertain and ambiguous that men of common intelligence must guess as to its meaning and differ as to its application. And that by reason thereof such statute is unconstitutional and a conviction under it would violate due process.

WHEREFORE, the defendants respectfully move that the indictment herein be quashed and that the defendants be discharged.

JAMES R. WILLIS,
Attorney for Defendants.

APPENDIX E.

MOTION FOR BILL OF PARTICULARS.

Virgil Ogletree, the defendant above named, by his attorney, James R. Willis, hereby moves this Court pursuant to R. C. of Ohio, § 2941.07, for a Bill of Particulars, and in support thereof avers as follows:

1. That the defendant, along with several other persons, was indicted under R. C. of Ohio, § 2915.13, for (as stated in the Indictment) carrying on a scheme of chance.

2. That the State well knows, or should know that the Indictment, as returned, lacks particularity and does not make available to the defendant facts sufficient upon which he can adequately prepare his defense and that the facts are not set forth in sufficient detail to protect the defendant against the danger of double jeopardy.

3. Defendant further says that no preliminary hearing was accorded him although specifically requested, that he was accorded no opportunity to meet his accusers face to face and to cross-examine them, and for that reason is wholly uninformed as to the nature of the charge against him.

4. Defendant therefore requests that this Court direct the State to furnish him in detail a Bill of Particulars setting forth specifically the *nature* of the offense charged in this Indictment.

5. Defendant further requests that said Bill of Particulars contain the following information:

A. The exact location, including the exact address where this alleged crime was committed.

B. The exact time the offense was committed by the defendant and the precise manner in which the defendant committed the alleged crime.

6. Further in support of the above specific request defendant states: the Indictment fails to state the location of the alleged crime and the nature thereof, and that defendant is without sufficient knowledge of the facts concerning the alleged act, to enable him to prepare his defense.

WHEREFORE, the defendant respectfully moves that the Court will grant the above request.

Respectfully submitted,

JAMES R. WILLIS.

APPENDIX E'.

BILL OF PARTICULARS.

(Filed September 3, 1964.)

Responding to the request of Virgil Olgetree for a bill of particulars, the Prosecuting Attorney says that the State of Ohio will prove at the trial of the above-entitled case the following:

That Virgil Olgetree on or about the 26th day of March 1964 unlawfully carried on a certain scheme of chance, to-wit, a stock and bond numbers game known as "clearing house."

That Virgil Olgetree carried on said illegal game in various parts of Cuyahoga County and that he also carried on said game by tabulating clearing house numbers at 722 Thornhill Drive in the City of Cleveland, Cuyahaga County, Ohio.

The Prosecuting Attorney says that evidence which is proof of the facts alleged in the indictment will be introduced at the time of trial of this cause.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County,
By GEORGE J. MOSCARINO,
Assistant Prosecuting Attorney.

APPENDIX F.

MOTION TO QUASH SEARCH WARRANT AND MOTION TO SUPPRESS.

Now come the defendants, Virgil Ogletree, et al., by and through their duly retained counsel and respectfully move this Court to quash the said search warrant issued herein, and to order the alleged property seized pursuant thereto, which might otherwise be illegally used against them, suppressed as evidence, and in support thereof avers as follows:

1. That the affidavit on which said warrant is based fails to allege sufficient facts or allegations of facts and that such defect is fatal according to the statute in such cases made and provided, to wit: Revised Code of Ohio § 2933.23.

2. That the search warrant was improperly issued in that the affidavit was based on hearsay and conclusions rather than the affiants' personal knowledge or the existence of reasonable grounds to believe that the crime alleged was in the process of commission and that such defect is fatal according to the Constitution in such cases made and provided.

3. The search warrant issued herein failed to comply with the absolute requirements of Revised Code of Ohio, § 2933.24 and that such failure is fatal according to the law and constitutions in such cases made and provided.

4. The search warrant as issued was further defective in the following respects: (a) was general in nature, (b) failed to particularly describe the place to be searched and the person, property or things to be seized.

5. That the said warrant which purports to authorize the search of "John Doe" does not constitutionally authorize the search of any individual; hence, a search pursuant thereto of any individual is unwarranted, illegal, unconstitutional and void.

6. That the warrant as issued authorizes a general or exploratory search, the type of which is prohibited by law.

7. The warrant was not served in accordance to Revised Code of Ohio, § 2935.12 the statute provided in such cases for the execution of search warrants.

8. The officers in seizing certain property supposedly under the command of the "warrant" issued herein did not comply with the mandatory requirements of Revised Code of Ohio § 2933.241, and that such failure renders their acts unlawful and as a consequence unreasonable.

9. That the said complaint filed in this Court is founded wholly upon evidence obtained by an unlawful, and unreasonable search and seizure in violation of the defendants' rights under the Constitution of the United States.

WHEREFORE, the defendants pray that the search warrant herein be quashed for the reasons set forth and described, as well as others to be disclosed at the hearing of this Motion, and that the property thereby obtained be suppressed as evidence, and the same be excluded as evidence against them upon their trial, and also that all conversations after said illegal arrest and search be similarly ordered suppressed.

JAMES R. WILLIS.

APPENDIX G.

PERSONAL PROPERTY SEARCH WARRANT.

THE STATE OF OHIO,
CUYAHOGA COUNTY,
CITY OF CLEVELAND, SS.

To the Bailiff of Cleveland Municipal Court—Greeting:

WHEREAS, there has been this day filed with me, JAMES T. CASSIDY, Judge of Cleveland Municipal Court, an affidavit for search warrant, of which the following is a copy:

Before me, James T. Cassidy, a Judge of Cleveland Municipal Court, personally came Raymond McCool who being duly sworn according to law, deposes and says, that on or about the 26 day of March A.D., 1964, at the City of Cleveland in said County of Cuyahoga, the following described personal property, to-wit:

1. Clearing house slips, adding machine tape and other paraphernalia used in carrying on a clearing house operation number game.

* * * * *

4. Weapons, implements, tools, instruments, articles or property used as a means of the commission of crime and/or such objects or articles are in the possession of one Persons unknown with the intent to use the same as a means of committing crime, to-wit: Clearing House numbers game operation.

5. That affiant believes and has good cause to believe that said personal property, or some part thereof is located and concealed in said City and County in a certain 2½ story frame dwelling building, located at 722 Thornhill Drive in said City and County and known as Sublot 178. Affiant further deposes and says that the facts upon which

such belief is based are as follows: Information received from reliable informer made observations of premise observed known persons entering premise who are known to use or persons interest in clearing house operation numbers game.

Search to be made in the Day Season.

* * * * *

These are therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the day season or the night season, into said building garage, or other building in connection therewith as aforesaid, and there diligently search for Clearing house slips, adding machine tapes and other paraphernalia used in carrying on a clearing house operation numbers game, and that you bring the same or any part thereof, found on such search, and also the body of John Doe (real name unknown) or Jane Doe (real name unknown) forthwith before our Municipal Court aforesaid to be disposed of and dealt with according to law.

Sworn to before me by the said Raymond McCool and subscribed in my presence this 26 day of March, 1964.

GIVEN UNDER MY HAND, and seal of said Court, this 26th day of March, 1964.

JAMES T. CASSIDY,
Judge of Cleveland Municipal Court

HELEN J. LYONS,
Clerk of Cleveland Municipal Court

BY J. J. GARVEN,
Deputy Clerk.

APPENDIX H.

AFFIDAVIT FOR SEARCH WARRANT.

THE STATE OF OHIO,
CUYAHOGA COUNTY,
CITY OF CLEVELAND, SS.

Before me, James T. Cassidy, a Judge of Cleveland Municipal Court personally came Raymond McCool, who being duly sworn according to law, deposes and says, that on or about the 26 day of March A.D. 1964, at the said City and County, the following described personal property, to-wit:

1. Clearing house slips, adding machine tape and other paraphernalia used in carrying on a clearing house operation number game.

* * * * *

4. Weapons, implements, tools, instruments, articles or property used as a means of the commission of crime and/or such objects or articles are in the possession of one Persons unknown with the intent to use the same as a means of committing crime, to-wit: Clearing House numbers game operation.

5. That affiant believes and has good cause to believe that said personal property, or some part thereof is located and concealed in said City and County in a certain 2½ story frame dwelling building, located at 722 Thornhill Drive in said City and County and known as Sublot 178. Affiant further deposes and says that the facts upon which such belief is based are as follows: Information received from reliable informer made observations of premise observed known persons entering premise who are known to use as persons interest in clearing house operation scheme of chance.

Search to be made in the Day Season.

Said affiant further says that John Doe (Real Name Unknown) did unlawfully have in his possession said personal property as aforesaid: and further deponent says not; contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Ohio.

(Signed) RAYMOND McCOOL.

Sworn to and subscribed before me, this 26 day of March A.D. 1964.

(Signed) JAMES T. CASSIDY,
Judge of Cleveland Municipal Court.

BRONIS J. KLEMENTOWICZ,
Prosecuting Attorney,
By (Signed) EDWARD V. CAIN,
Assistant Prosecutor.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1091 [redacted]

VIRGIL OGLETREE, *et al.*,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

LLOYD O. BROWN,
Assistant Prosecuting Attorney,
Criminal Courts Building,
Cleveland, Ohio 44114,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1091 Misc.

VIRGIL OGLETREE, *et al.*,

Petitioners,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court refused leave to appeal.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

QUESTIONS PRESENTED.

Petitioners claim they were denied due process of law in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States in that (1) they were convicted under a statute that is vague and ambiguous and therefore unconstitutional; (2) they were convicted upon evidence obtained by an illegal search and seizure; (3) they were prejudiced by the prosecutor's comments on the failure of their codefendants to testify; (4) the trial court's instruction inadequately defined the offense.

STATEMENT OF THE CASE.

On March 26, 1964, at about 3:00 p.m., Patrolmen McCool and Wandra of the Cleveland Police Department were observing the property at 722 Thornhill Drive, in Cleveland. They saw the defendants Virgil Ogletree and Henry Harris arrive and enter the house by the side door at about 3:15 p.m. (R. 84). At about 3:20 p.m. a woman, later learned to be Janice Franklin, arrived carrying a brown paper bag and went in the side door (R. 85). At about 3:50 p.m. four other women—Marie Bishop, Juanita Umphryes, Kathryn Bishop and Nannie Teague—arrived and they also went in the house (R. 84). At about 4:00 p.m. a man later learned to be Jesse Haskins arrived and entered the house (R. 87).

At this point the officers went to a parking lot at St. Clair and Eddy Road where they picked up Sgt. Dever and other officers. Armed with a search warrant they returned to 722 Thornhill Drive and went to the side door of the house. Sgt. Dever knocked and announced, "This is the police. I have a search warrant." (R. 89.)

Someone inside the house yelled and the officers heard

the footsteps of persons running (R. 90). The officers then pushed in the door and gained entrance. The officers attempted to gain entrance to the attic through a second floor door by means of a hatchet. This was not successful because a plywood trapdoor was in the way. The Fire Department was then called (R. 95). Smoke was then coming from the third-floor windows of the house (R. 96). Entrance into the attic was made through the third-floor windows. When the officers entered the attic, all of the defendants were standing or sitting around two large tables. Fires were burning in an incinerator and in a wash bucket. The occupants of the room were all arrested. The officers photographed burned adding machine tapes along with four adding machines and other paraphernalia. These items were then removed and tagged and admitted as evidence at the trial.

The search warrant in this case was predicated on information from a reliable informer plus the personal observations of Patrolman McCool of the Bureau of Special Services at 722 Thornhill Drive. The officer had seen Ogletree, who was a known clearinghouse operator, go into the house with an unidentified female on March 25th, and with this information and the information from the informer the officer presented to Judge James Cassidy an affidavit (St. Ex. 1) and obtained the warrant (St. Ex. 2). Armed with this warrant and after further surveillance the officers entered the house as related above. As a result the eight defendants were arrested and charged with promoting a scheme of chance and later indicted for promoting a scheme of chance (R. C. 2915.13).

All of the defendants pleaded not guilty. Several motions were filed and argued to the court, to-wit, motion to quash, motion for a bill of particulars, motion for a supplemental bill of particulars, motion to suppress evidence.

All of these motions were overruled except the motion for a bill of particulars. A bill of particulars was filed.

Upon trial to a jury, all of the defendants were found guilty as charged. The Court of Appeals, Eighth Appellate District of Ohio, found no error prejudicial to the appellants, Virgil Ogletree and Kathryn Bishop, and affirmed the judgment of the trial court. As to the other defendants, the judgment was reversed because of comment by the trial court and the prosecutor upon their failure to testify. The Supreme Court of Ohio refused to certify and review.

ARGUMENT.

A. The petitioner's argument that the statute under which they were indicted (Section 2915.13 of the Ohio Revised Code) is so vague and ambiguous as to be void and without legal effect involves the construction of a state penal statute, with which this Court is not ordinarily concerned.

Furthermore, the petitioners' objections are without merit. The pertinent part of Revised Code Section 2915.13, is as follows:

> "No person shall establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor' for or on account of a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value."

Particular complaint is made that the words "carry on" are not sufficiently descriptive of the court of conduct prohibited. As applied to gambling, this phrase is defined in 38 *Corpus Juris Secundum,* "Gaming," sec. 1, p. 54:

> "*Carry On.* As applied to gambling or a business of like character, the phrase means to continue to prosecute, to keep in progress, or to manage or to be engaged in." Citing *Thompson v. Ackerman*, 21 Ohio Cir. Ct. 740, 744, 12 Ohio Cir. Dec. 456.

In the cited case of *Thompson v. Ackerman* the court had under consideration the recovery of possession of leased premises used for gaming purposes. The Circuit Court said:

> " 'To conduct,' according to the Century Dictionary, means to direct the course of, to manage, to carry on, and by the same authority, to carry on means to manage or be engaged in, to continue, to prosecute, to keep in progress."

Also, an Ohio Court of Appeals in *State v. Gardner*, 75 Abs. 319, 137 N. E. 2d 44 (1954), did not have any difficulty whatever in determining the meaning of the phrase "carry on." The Court said in a per curiam opinion:

> "The police officer testified how the numbers game was operated, how the slips introduced into evidence were used in the game, and that the defendant 'carried on' a numbers game."

The petitioners, with the exception of Virgil Ogletree, claim they were not furnished with a bill of particulars. All their requests for a bill of particulars were duplicates of the request made by Ogletree and were filed by the same counsel, Mr. Willis. A bill of particulars was furnished to Mr. Willis for Ogletree, and in the circumstances this was sufficient.

As to the denial of an amended bill of particulars to Mr. Ogletree, the rule is stated in *State v. Petro*, 148 O. S. 473, that, "A prosecuting attorney is not required to disclose the state's evidence through a bill of particulars, but is required to state specifically the nature of the offense

charged, * * *." In the bill of particulars furnished to Ogletree the offense charged is stated specifically and that is all that was required. To have stated more would be giving to the defendant matters of evidence.

B, C, and D. Petitioners' questions of law three through eight deal with the claim that there was introduced into evidence over the objection of the defense items obtained by an illegal search warrant.

Section 2933.23 of the Ohio Revised Code sets forth the essential factors to be included in the affidavit for a search warrant. The affidavit must state:

1. The place to be searched.
2. The person to be seized.
3. The thing to be searched for.
4. That the complainant believes or has good cause to believe that the things are there concealed.
5. The facts upon which such belief is based.

In addition, the judge or magistrate may demand other and further evidence before issuing the warrant.

In the present case, on March 25, 1964, the personal observation was made by Officer McCool of the Bureau of Special Investigation of the Cleveland Police Department, assigned to investigate rackets and gambling operations. Officer McCool had had years of experience in investigating clearinghouse activities and was very familiar with its method, paraphernalia and manner of operation. On March 25, Officer McCool saw Virgil Ogletree, a known clearinghouse operator, and others going into the house at 722 Thornhill Drive. Armed with this information and with the information given him by a reliable informer, the officer went to the Cleveland Municipal Court and

consulted with Judge Cassidy. The affidavit was then filed and the search warrant issued by the judge.

Whether the affidavit alleged sufficient facts upon which to base probable cause was in the first instance for the trial court to determine. By overruling the motion to suppress the trial court in effect found from examination of the affidavit, and the search warrant itself disclosed, that the affidavit was prepared and the search warrant issued, first, upon observations of a member of the Cleveland Police Department and, second, from information from a confidential source.

The officer did not rely solely upon the information he had received from the informer concerning the clearinghouse activity at this address. He went further and actually made positive observation at the precise point where the information concerning clearinghouse activity had indicated. Here we have credible confidential information from a reliable informant plus actual observation by police officers. These facts formed the foundation for the officer's having good cause to believe that clearinghouse activity with its incident equipment and paraphernalia existed in the house at 722 Thornhill Drive.

No decision by this Court has ever struck down a search warrant on the ground of lack of probable cause in a situation where there was actual observation by government officers.

Probably the leading case on the issuance of a search warrant is *Aguilar v. Texas,* 378 U. S. 108, 12 L. ed. 2d 723. There the Court reversed because the affidavit did not contain any information other than that "Affiants have received reliable information from a credible person and do believe * * *." No other information was brought to the attention of the magistrate. In the present case the affidavit recites that the officer made personal observation

in addition to having the information from a reliable informer.

The decision in *McDonald v. United States,* 335 U. S. 451, does not support the petitioner's position. In *McDonald* the officers did not obtain a search warrant, but after hearing an adding machine "one of them opened a window leading to the landlady's room and climbed through it." There was an actual breaking and entering without a warrant.

The decision in *Stanford v. Texas,* 379 U. S. 476, cited by petitioners, refers to search warrants that (a) are general in nature, and (b) fail to describe particularly the place to be searched and the person or property to be seized. In the present case the warrant specifically sets forth contraband to be seized at a specific address and describes the contraband as "clearing house slips, adding machines and other paraphernalia used in carrying on a clearinghouse operation numbers game."

Petitioners complain that the warrant was not executed in compliance with the statutes requiring notice of authority and purpose before forcing entry. There is no law prescribing a minimum time that officers must wait for a response after informing that they are police officers and have a search warrant. Section 2935.12 does not specify any length of time or require any words of refusal. In *Ker v. California,* 375 U. S. 23, Mr. Justice Clark points out that "suspects have no constitutional right to destroy or dispose of evidence." The *Ker* opinion goes so far as to state that the officers would not have been required to demand entrance and state their purpose "if the officers' peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. The California statute under consideration in *Ker* is similar to Section 2935.12 of the Ohio Revised Code.

In the present case the officers did state their purpose and authority. Surely, in the circumstances of this case the officers acted properly, and even so the very evidence they were seeking was in process of being burned while they were effecting entrance. The officers testified, on both direct and cross-examination, that they knocked on the door and in clear, audible voices announced that they were the police and had a search warrant. They heard footsteps and voices inside saying, "It is the police." Only after being refused admittance did they break down the outer and inner doors.

Miller v. United States, 357 U. S. 301, cited by petitioners, can be distinguished even on the facts set forth in defendant's brief. In the *Miller* case the officers broke the door without a warrant and without announcing themselves. There was no notice of authority.

E. Whether these petitioners were actually carrying on a scheme of chance is an issue of fact which has been determined in the Ohio courts and is not open to reconsideration by this Court. No denial of constitutional rights is involved in this issue.

F. Petitioners claim that because the convictions of their codefendants who did not testify were reversed and remanded for violation of the Griffin rule, the "interest of justice" requires that their convictions likewise be reversed. Petitioners' theory apparently is that the prejudicial effect of comment on the failure of the codefendants to testify contributed to the conviction of the defendants who did testify on their own behalf. Such contention is obviously without merit. If anything, the impact would have been favorable to petitioners for having taken the witness stand while their codefendants remained silent.

Similar claims were presented to the Ohio Supreme Court in *State v. Lynn*, 5 Ohio St. 2d 106, where the error was rejected on procedural grounds, and in *State v. Scott*, where the motion for leave to appeal was overruled and appeal as of right dismissed. In this situation there is no constitutional error presented requiring review by this Court.

G. Petitioners contend that the trial court's instruction as to the meaning of the Ohio statute under which petitioners were charged amounts to a denial of due process. This, along with their other claims of error involving matters of evidence and statutory construction, furnish no ground for this Court's intervention, for under our federal regime, state courts, state agencies, and state legislatures are the final expositors of state law. *Brady v. Maryland*, 373 U. S. 83, 10 L. Ed. 2d 215.

CONCLUSION.

The officers did use a search warrant in this case. They obtained a warrant from a judicial officer "upon probable cause," including personal observation, supported by oath or affirmation and particularly describing the place to be searched and the things to be seized. In executing the warrant they complied with the statute requiring notice of authority and purpose before forcing entry.

The petitioners herein have not shown any deprivation of the constitutional protections against unnecessary invasions of privacy entitling them to review by this Court. The writ should therefore be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County,

LLOYD O. BROWN,
Assistant Prosecuting Attorney,
Attorneys for Respondent.

APR 5 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1091.

VIRGIL OGLETREE and KATHRYN BISHOP,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

REPLY BRIEF OF PETITIONERS
To Respondent's Brief in Opposition to Petition For Writ of Certiorari.

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REPLY BRIEF OF PETITIONERS
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I.

Respondent's Brief in opposition, in its counter-statement of facts, sets forth the following selected points:

1. That on March 25th [the day prior to the arrest and search involved here] a police officer "saw Virgil Ogletree, a known clearinghouse operator and others going into the house" that was searched;

2. And "that armed with the information given him by a reliable informer, the officer went to the Cleveland Municipal Court" and obtained a search warrant (Respondent's Brief, pp. 6-7).

3. Further, that "the officer did not rely solely upon the information he had concerning the clearinghouse activity at this address. He went further and actually made a positive observation at the precise point where the information concerning clearinghouse activity had indicated" (Respondent's Brief, p. 7).

Based on these selected excerpts of his argument, it is apparent that Respondent is attempting thereby to suggest that the reliability of their undisclosed informant was established "in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in the opinions of this Court applying that Amendment" *Ker v. California,* 374 U. S., at 33.

The above argument, it is hereby submitted, is unsound for a number of reasons. First, it is factually inaccurate. This is so not merely because we have only the word of the officer that Ogletree was "a known clearinghouse operator," and it was established that Ogletree had never been convicted of any such offenses. But even more than this, the factual inaccuracies being delineated go to the crucial statement that the affiant officer saw Ogletree and others enter this house, and to the statement, in the Brief, that the alleged observation was made "at the precise point where the information concerning clearinghouse activity had indicated" (*ibid*). Yet, it is from these asserted facts they argue this case presents "credible information from a reliable informant plus actual observation by police officers" (*ibid*).

Quite possibly the reason Respondent's Brief fails to direct us to any page reference in the record for these bold assertions is because counsel must know the record cannot support his thesis. Necessarily then, as was said in *Beck v. Ohio,* 379 U. S., at 97, it is possible that an informer did in fact relate information to the police, and that information may have been precisely what Respondent has suggested in his brief—that is, that there was clearinghouse activity at the address given—but the record must show, and this record does not, "what the informer actually said, and why the officers thought the information was credible." (*ibid*).

Again, it is our contention that this warrant is constitutionally defective when analyzed by the formula gleaned from *Aguilar v. Texas*, 378 U. S. 108 and *United States v. Ventresca*, 380 U. S. 102. More specifically, the magistrate in this case was not told any of the underlying circumstances from which the informant drew his conclusions (whatever they were), nor were any of the underlying circumstances from which the affiant concluded that his undisclosed informant was "credible" or his information "reliable" disclosed. The result then is inescapable, the necessary inferences from these "facts" were not drawn "by a neutral and detached magistrate" as the precedents require, but by a police officer "engaged in the competitive enterprise of ferreting out crime" (*Giordenello v. United States*, 357 U. S., at 486), or "by an unidentified informant" (*Aguilar v. Texas, supra*).

This conclusion, it is submitted, is even more cogent in view of this Court's recent decision in *McCray v. Illinois*, ____ U. S. ____, 36 U. S. Law Week 4261. For if it were otherwise a police officer would indeed be the sole judge of the existence of probable cause and the requirement that an affidavit must support the magistrate's disinterested determination would pale into insignificance.

II.

The other arguments made in Respondent's Brief are of the routine variety. For example, they resort to the meaningless statement that "a prosecuting attorney is not required to disclose the state's evidence through a Bill of Particulars" as being the complete answer to the timely and realistic request by an accused for some meaningful articulation of the charge being made against him (Brief in Opposition, pp. 5-6). Also they argue that since the request for a Bill of Particulars by the Petitioner Bishop,

was a carbon copy of Ogletree's request, a Bill of Particulars having been furnished Ogletree, under the circumstances, that was sufficient (*ibid*). The short answer to this, of course, is that guilt remains personal and individual, and it is no answer to say that because one defendant was given a "Bill of Particulars," the same suffices for all. This argument we make quite apart from the fact that even as to Ogletree, the Bill given him was defective.

And the Respondent's argument that their comment on the failure of the co-defendants to testify was, if anything, favorable to these Petitioners must be classified as a classic. Surely it can not be, in a case where eight people are charged with "carrying on" (whatever that means) a scheme of chance, and the jury is charged that those on trial could be convicted on an aider and abettor theory, that a general verdict of guilty against all eight can be tortured to mean those whose convictions were affirmed were the principals while those whose convictions were reversed were merely aiders and abettors. Not only this but the belief is sure, or at least "beyond a reasonable doubt" (*Chapman v. California*, ____ U. S. ____, 32 U. S. Law Week, at 4199), that the constitutional error complained of did not influence or "contribute to the verdict obtained" against these Petitioners (*ibid*).

III.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in their petition for Writ of Certiorari, petitioners renew their prayer that the petition for Writ of Certiorari be granted.

Respectfully submitted,

JAMES R. WILLIS,
Counsel for Petitioners.

SUPREME COURT, U. S.
MAY 1 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1091.

VIRGIL OGLETREE and KATHRYN BISHOP,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

APPLICATION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI.

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THE STATE OF OHIO,

Respondent.

APPLICATION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI.

Petitioners respectfully request that this Court grant rehearing of its order dated April 17, 1967, which denied certiorari, and that the Court now grant certiorari.

I.

The Petition for Certiorari previously filed herein presented the following questions:

1. Whether R. C. of Ohio, § 2915.13, which makes it a crime to "carry on" a scheme of chance, is unconstitutional for the reason that it is vague and ambiguous?

2. Whether an accused can be convicted on an indictment which fails to provide certain minimum information necessary to defense trial preparation, where the Trial Court, upon request, fails to direct the prosecution to supply the accused either a meaningful bill of particulars, or any bill of particulars?

3. Is probable cause for the issuance of a search warrant properly predicated on an affidavit which merely recites that the affiant's belief that certain gambling paraphernalia was on the premises was based on "information received from a reliable informer made observations of premises observed known persons entering premises who are known to use [sic] as persons interest [sic] in clearinghouse operation scheme of chance"?

4. Can probable cause for the issuance of a warrant be based on an affidavit which does not set forth any of the underlying circumstances from which the undisclosed informer drew his conclusions, and which also fails to set forth any of the underlying circumstances from which the officer concluded that the informant, whose identity was not disclosed, was "credible" or his information "reliable"?

5. Whether a search warrant purporting to authorize a search for and seizure of "clearinghouse slips, adding machine tape and other paraphernalia used in carrying on a clearinghouse operation number game" is a general warrant the "kind which it was the purpose of the Fourth Amendment to forbid"?

6. Whether a search warrant can be properly issued for certain described property, when neither the affidavit, nor the warrant, nor the evidence support any conclusion other than the one that the affiant, or his informant, "merely suspect, believed or concluded" that such property could be found if the described premises were searched?

7. Whether an affidavit provides a sufficient basis for the finding of probable cause to conduct a search, where the affidavit "contains no affirmative allegation that the affiant spoke with personal knowledge" and "does not even contain an affirmative allegation" that the affiant's

unidentified source 'spoke with personal knowledge' as to the presence of any of the property described as the object of the search?

8. Where the weight of the evidence supports the conclusion that police officers in executing a "search warrant" violated the Fourth Amendment by an unannounced, forcible intrusion into private premises, can the ensuing search be validated and the fruits thereof deemed admissible?

9. Does due process of law require the reversal of the Petitioners' convictions, where during their joint trial with six (6) co-defendants [a] counsel for the State adversely comments on the failure of such co-defendants to testify in their own behalf, and [b] the trial judge not only instructs the jury that such fact can be considered in arriving at a verdict, but [c] refused to instruct the jury not to draw any inferences from such failure to testify?

10. Should the convictions of these Petitioners be reversed in the interest of justice, where the appeals court reversed the convictions of their six co-defendants because of prejudicial comment on their failure to testify, by the court and prosecutor, who had forcibly argued, by implication, that the necessary inferences to be drawn from this failure to testify should affect all those jointly being tried for "carrying on" a scheme of chance?

11. Where two accused persons are jointly tried with six co-defendants on a charge of "carrying on" a scheme of chance, and the court instructs the jury that those on trial could be convicted if the jury found them to be "aiders and abettors," and the Court of Appeals reverses the conviction of the six co-defendants on constitutional grounds, since there is no way of telling from a general

verdict the theory upon which the jury arrived at its verdict, can it be held that those whose convictions were not reversed were properly convicted?

12. Whether an instruction that "carrying on" a scheme of chance within the meaning of R. C. of Ohio § 2915.13 means "doing something" in connection therewith correctly, and adequately, defines a criminal offense within the meaning of the constitution?

II.

The petition for certiorari developed the almost classic manner the Ohio Courts have continued to succeed in giving only grudging application to the standards developed by this Court for the implementation of rights guaranteed by the federal constitution.[1] Hence the possibility exists in a case such as this one, where the Court (albeit by the narrowest possible margin) has refused review, that such conviction could not possibly survive any meaningful scrutiny of its merits. This is so for a number of reasons. Not the least of which is the fact that it has never been held, nor could ever affirmatively be held that an affidavit containing the naked assertion that the affiant's belief was based on "information received from reliable informer made observations of premises observed known persons

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[1] The Ohio Supreme Court's general reluctance to follow this Court's explicit commands is of course well known. Cf. *Doughty v. Sacks,* 173 Ohio St. 407 vacated and remanded sub nom. *Doughty v. Maxwell,* 372 U. S. 781 (1963); *Doughty v. Sacks,* 175 Ohio St. 46 reversed sub nom. *Doughty v. Maxwell,* 376 U. S. 202 (1964); *State v. McLeod,* 173 Ohio St. 520, vacated and remanded, 378 U. S. 582 (1964); *State v. McLeod,* 1 Ohio St. 2d 60, reversed, 381 U. S. 356 (1965). See also *State v. Arrington,* 2 Ohio St. 2d 172 (1965); *State v. Arrington,* 3 Ohio St. 2d 61 (1965); *State v. O'Connor,* 177 Ohio St. 181, vacated and remanded, 382 U. S. 286 (1965); reversed ____ U. S. ____ (1966); *State v. Bernius,* 177 Ohio St. 155 (1964).

entering premises who are known to us as * * * persons interest[ed] in clearinghouse operation scheme of chance" qualified for the issuance of a warrant. Further, in this case even the disclosure upon inquiry that only one person known to the affiant was seen entering the premises on the occasion of this single observation (the other being an unknown female), perforce exposes the absolute lack of substance in such affidavit.

Also it is next to impossible that this Court, or any court, could expressly approve the warrant actually issued in this case with its grant of power to search for a multitude of articles including such property as one might find in a *numbers office* (property of evidentiary value only?), weapons, implements, tools and the like.

Surely if there was probable cause to believe such specifically enumerated property was on the described premises such knowledge would at least belie the factual allegation, in the warrant, to the effect that this property was in the possession of "persons unknown with intent to use the same as means of committing crime, to-wit: clearinghouse numbers game operation."

III.

In this quest for rehearing, it is urged that the comment question presented in our petition—that is, whether or not admittedly prejudicial comments on the failure to testify by six of eight co-defendants, all of whom were being represented by the same attorney, can be so prejudicial as to require a new trial—is an open question. One that is surely ripe for this Court's determination. At least there appears to be no decision by this Court as to any collateral effects of such comments, and whether or not they can so infect a trial as to require its complete vitiation.

Thus, it is most significant that the Ohio Court of Appeals, while affirming the convictions of the Petitioners, merely held that in their judgment "no error prejudicial" to them had occurred. Further, it does not appear, from the above quoted conclusory statement, what standard was used by the Appellate Court in making this judgment. Could it be that that Court felt these Petitioners had the burden of proving it prejudiced them? If that is the standard, how then is it ever to be accomplished? Compare, *Fahy v. Connecticut*, 375 U. S. 85; *Chapman v. California*, __ U. S. __. Hence, it is submitted that if nothing else the trial judge, who has not had an opportunity to pass on any possible prejudice to Petitioners that may have emanated from these comments, ought to be required, by a mandate from this Court, to do so. Because, when one considers the fact that the trial Court expressly authorized the comments (over objections), and specifically instructed the jury that they could take any failure to testify into consideration (after refusing to given the *Bruno* instruction), it could not be clearer the Court was under the impression that no one's rights were being violated either by the argument or by his charge. His view may very well have been different had he known that both the argument and the charge offended the constitutional rights of persons then on trial before him. Viewed in this light, it cannot be denied, the reversal as to Petitioners six co-defendants at least presents a situation where the trial judge, if not the Appellate Court, should make specific findings. If the trial judge, he should determine this both as a matter of fact and as a matter of law.

By this application then, Petitioners seek at the very least, and as an alternative to a full review by certiorari, a direction to the lower Courts to make a meaningful determination on this question. A comparable direction

could be made in so far as the search and seizure arguments made in the Petition. This could be accomplished by vacating the judgment and remanding the case for consideration in the light of *Aguilar v. Texas*, 378 U. S. 108, *McCray v. Illinois*, __ U. S. __, and *Warden v. Hayden*, ___ U. S. ____ (No. 480).

Even conceding the ever increasing burden on state courts, a conviction as suspect as this one is ought not become binding without any articulation by any of the Courts from whom a definition of the rights involved herein have been sought. Upon remand, if the fundamental criteria established by this Court for the implementation of constitutional rights has been observed, it is but a simple matter for the State Courts to indicate this in their ultimate determination. This, of course, in our judgment would demonstrate that rights clearly available under this Court's interpretation of the constitution have been honored, by the Courts in Ohio, by their breach.

For the above reasons, Petitioners respectfully pray that this Court grant a rehearing.

Respectfully submitted,

JAMES R. WILLIS,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

The foregoing petition is believed to be well founded in point of law and has not been filed for purposes of delay.

JAMES R. WILLIS,
Attorney for Petitioners.